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HASNI ABAS

v.

KETUA POLIS NEGARA

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HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI J
[CIVIL SUIT NO: S7-21-247-2001]
10 FEBRUARY 2010

C ***TORT:*** *Vicarious liability - Liability of government - Acts of policeman - Whether government vicariously liable for acts of policeman - Whether Inspector General of Police may be held vicariously liable for acts of policeman - Effect of Failure to include tortfeasor as defendant*

D ***TORT:*** *Wrongful entry and search - Claim for damages - Whether entry and search was unlawful - Whether police committed trespass - Whether entry and search protected by s. 62 Criminal Procedure Code - Sufficient reasonable reasons shown for entry and search - No act of trespassing*

E The plaintiff's claim against the defendant was that of unlawful entry into the plaintiff's premises without a search warrant. The plaintiff alleged that on 5 December 1999 several policemen had climbed over his locked gate and entered and searched his house compound. In defence, DW1 stated that on 28 November 1999 he received a Police Report lodged by DW2 (the complainant) that he F was extorted by two men and his red colour KIA Sportage vehicle was taken by the two men. On 5 December 1999 DW2 spotted a red KIA Sportage and followed it and it led the police to the plaintiff's house. Since the plaintiff's gate was locked and since there was no response, the police had climbed over the gate, entered the compound and knocked on the door. DW1 then requested the G plaintiff to produce the registration card of the KIA Sportage found there. The vehicle was found to belong to the plaintiff's wife. The plaintiff claimed for special, general and exemplary damages.

Held (dismissing the plaintiff's claim with cost):

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(1) The policeman who is a public servant by virtue of art. 132 of the Federal Constitution is not an employee of the Ketua Polis Negara who if at all is only the head of service or more like a head of department of the policeman. He is not the employer of the alleged tortfeasor policeman. The alleged tortfeasor was I in fact the employee or servant of the Government of Malaysia. Therefore, the defendant was wrongly cited and the action could be struck off on this ground alone. (paras 14 & 15)

(2) Even if the defendant cited was the employer of the alleged tortfeasor policeman that the plaintiff was trying to prove was vicariously liable for the act of the policeman tortfeasor, the action must fail because the tortfeasor was not named or cited in the action. (para 16)

(3) Section 62 of the Criminal Procedure Code gives ample protection to the police in respect of search. The circumstance of the case warranted DW1 to act in accordance with s. 62 CPC read together with s. 20 of the Police Act 1967. There were sufficient reasonable reasons that arose in the mind of DW1 to act as he did. Therefore, there was no act of trespassing by the defendant. (paras 20, 21, 22, 23 & 24)

Case(s) referred to:
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***
Yong Moi Sin v. Kerajaan Malaysia & Anor [1999] 8 CLJ 651 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 62, 63, 384
Federal Constitution, art. 132
Police Act 1967, s. 20

Other source(s) referred to:
Clerk & Lindsell on Torts, 18th edn, p 221

For the plaintiff - Mohd Hanipa; M/s Mohamed Hanipa & Assocs
For the defendant - Mohammad Al-Saifi SFC

Reported by Amutha Suppayah

JUDGMENT

Noor Azian Shaari J:

[1] The plaintiff's claim against the defendant is that of unlawful entry into the plaintiff's premises without a search warrant. The plaintiff further claims that even if the search was a search authorised without a search warrant, the act is still considered as trespassing because there was failure to comply with ss. 62 and 63 of the Criminal Procedure Code (Act 593).

[2] The plaintiff claimed for special damages in the sum of RM1,464 (for replacing and fixing a new gate), general damages, exemplary damages and cost.

A **Plaintiff's Case**

[3] On 5 December 1999, PW1 (the plaintiff himself) saw several people climb over his gate and enter his house compound. He alleged that the gate was locked and did not hear any "salam" being given by these people ie, the police.

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[4] The plaintiff alleged that the police had entered his house compound and made a search on his property without any lawful search warrant. Therefore the entry tantamounts to trespassing.

C **[5]** The plaintiff further alleged that the police uttered abusive and harsh words to him in front of his family and neighbours and therefore he was put in an embarrassing situation and suffered trauma.

D **[6]** The plaintiff also states that he was asked to show the documents pertaining to the ownership of a KIA Sportage vehicle which was parked in his garage and after checking the vehicle they were satisfied that it belonged to PW3 (plaintiff's wife).

[7] The plaintiff asserts that the act was witnessed by PW2 E (a neighbour of the plaintiff) and PW3.

Defendant's Case

[8] In defence, DW1 stated that on 28 November 1999 he F received a Police Report lodged by DW2 (the complainant) that he was extorted by two men and his red colour vehicle, a KIA Sportage was taken by the two men. DW1 investigated the report under s. 384 of the Criminal Procedure Code.

[9] On 5 December 1999 DW2 spotted a red KIA Sportage near G the Cheras roundabout and decided to follow it and it led the Police to the plaintiff's house. It was here that the plaintiff alleged the unlawful entry.

[10] The defendant is not denying the entry but stated that DW1 H gave the "salam" and waited for 10 - 15 minutes. The gate was locked and since there was no response, climbed over the gate and entered the compound of PW1 after which he knocked at the door and requested PW1 to produce the registration card of the KIA Sportage which he subsequently found belonged to PW3.

I **[11]** The defendant contends that there is power and responsibility under the Police Act 1967 and the Criminal Procedure Code (Act 593) in investigating the Police Report lodged by DW2. The DW1

believed that there was an urgent need to search without a search warrant as he is authorized under s. 62 of the Criminal Procedure Code (Act 593).

[12] At the end of the trial I dismissed the plaintiff's claim with cost.

[13] In this case, I will first deal with the issue of the parties. By this action it is very clear that the defendant is attempting to make the Ketua Polis Negara vicariously liable for the act of the policeman. *Clerk & Lindsell on Torts*, 18th edn, at p 221 states that "the two most important classes of persons for whose torts another person maybe liable are employees and independent contractors."

[14] Here, the policeman who is a public servant by virtue of art. 132 of the Federal Constitution is not an employee of the Ketua Polis Negara who if at all is only the head of service or more like a head of department of the Policeman. He is not the employer of the alleged tortfeasor Policeman. The alleged tortfeasor is in fact the employee or servant of the Government of Malaysia.

[15] Therefore, I would hold that the defendant is wrongly cited and the action can be struck off on this ground alone.

[16] However, even if the defendant cited is the employer of the alleged tortfeasor Policeman that the plaintiff is trying to prove is vicariously liable for the act of the Policeman tortfeasor, the action must fail. This is because the tortfeasor is not named or cited in the action.

[17] In the Federal Court case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 at p. 678 it was said that:

> [16] Thus, I entirely agree with the views expressed by Abdul Aziz J (later FJ) in *Haji Abdul Rahman*, *supra*. Contrary to the finding of the Court of Appeal, *Haji Abdul Rahman* was correctly decided and should be upheld. Therefore, on the proper construction of ss. 5 and 6 Act 359, in any claim in tort against the Government, **the officer of the Government who was responsible for the alleged tortuous act must be made a party and liable vicariously as principal.** It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government.

A [17] In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. **None of the Governments sued is capable of committing the wrong pleaded**. Since the Governments' liability in tort can only be vicarious by virtue of ss. 5 and 6 of Act 359, and as the officers who were responsible for the alleged
B wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Governments as primary tortfeasors. That being so, the appellants' application to strike out the respondents' actions is meritorious. (Emphasis added)

C **[18]** On this ground alone since "the officer of the Government who was responsible for the alleged tortious act" is not named as a party there is "therefore not possible in law to maintain a successful claim be laid against the Government as primary ..." the plaintiff's claim must be dismissed.

D **[19]** On the issue of trespassing, as mentioned earlier, the entry without a search warrant is not denied by the defendant.

[20] However, s. 62 of the Criminal Procedure Code (Act 593) gives ample protection to the Police in respect of search. The
E section provides as follows:

Search without warrant

62. (1) If information is given to any police officer, not below the rank of Inspector that there is reasonable cause for suspecting
F that any stolen property is concealed or lodged in any place and he has good grounds for believing that by reason of the delay in obtaining a search warrant the property is likely to be removed, that officer by virtue of his office may search in the place specified for specific property alleged to have been
G stolen.

(2) A list of the property alleged to have been stolen shall be delivered of taken down in writing with a declaration stating that such property has been stolen and that the informant has good grounds for believing that the property is deposited in
H that place.

(3) The person from whom the property was stolen or his representative shall accompany the officer in the search.

[21] From the evidence it is clear that DW1 who is a Chief
I Inspector had received information of the stolen vehicle and that subsequently he followed a red Kia Sportage from the Cheras roundabout and this led him to the plaintiff's house.

[22] The circumstance of the case warrants DW1 to act in accordance with s. 62 of the Criminal Procedure Code read together with s. 20 of the Police Act 1967 which provides for the "General duties of police officers".

[23] There were sufficient reasonable reasons that arose in the mind of DW1 to act as he did - *Yong Moi Sin v. Kerajaan Malaysia & Anor* [1999] 8 CLJ 651. If DW1 were to fulfil the requirements of s. 63 of the Criminal Procedure Code (Act 593) and obtained a search warrant he would have definitely lost track of the vehicle that he suspected was stolen.

[24] For the foregoing reasons I hold that there was no act of trespassing by the defendant. I therefore dismissed the plaintiff's claim with cost.

[25] On the special damages claimed by the Police, the plaintiff claims for RM1,460 for the repair and fixing of his "pintu pagar grill". I find it most improbable that the act of climbing over the gate could have caused such a damage to the gate that it had to be replaced at a price of RM1,460. This amount must not be allowed at all cost. As to the cost of the Police Report, this amount should be allowed if liability against the defendant is proven.